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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 31

SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED LONG TERM CARE WORKERS, Charging Party, and MONTECITO HEIGHTS HEALTHCARE, Respondent.	No. 31-CA-129747 **CHARGING PARTY'S REPLY TO ANSWERING BRIEF TO CHARGING PARTY'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

I. INTRODUCTION

Charging Party submits that Respondent's Answering Brief undermines its own arguments.

1. The Charging Party's Cross-Exceptions demonstrate why the Federal Arbitration Act ("FAA") does not apply. These issues are raised because it is Montecito which raised the FAA as a defense. Thus, all these legal arguments are properly raised because they are in response to the primary argument raised by Montecito as to why Section 8(a)(1) does not render its forced unilateral arbitration procedure unlawful.

2. Montecito complains because the Charging Party has raised the Religious Freedom Restoration Act ("RFRA"). It makes an incredibly silly argument that the RFRA only applies when employers raise it. That is an interesting argument in light of *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) which held the RFRA applies to any person. In any case, it is quite silly that it only applies to corporate entities and not individuals and other persons.

The RFRA is a federal statute. It governs these proceedings. The RFRA was specifically enacted to assure that federal law such as the National Labor Relations Act ("NLRA") or the FAA are applied in ways that do not interfere with the exercise of religious freedom. As Montecito argues the FAA should trump (disgusting pun) the NLRA. Our argument is that the FAA must be interpreted in light of the RFRA. Similarly the NLRA must also be interpreted consistent with the RFRA. Montecito's argument that only corporations are protected by the RFRA must be rejected.

3. The Respondent has misstated the Charging Party's argument about the applicability of FAA. We extensively briefed this in our Brief in Support of Cross-Exceptions and we need not repeat that argument. Nonetheless we point out that the one case which Respondent cites for the argument that the "Federal Courts have repeatedly found that the FAA applies [to] arbitration agreement covering the employee of employer such as Respondent, who is engaged in interstate commerce" ignores the Supreme Court authority exactly to the contrary. See *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956). Here, where there is a facial challenge

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because the FUAP restricts concerted activity, there is no evidence that any transaction or any contract affects commerce or that it affects commerce in ways regulated by the FAA. If this were circumstances found in other Board cases where there was a Federal Court Complaint alleging commerce jurisdiction over the federal claim, this might be a different case. It is not. There is no federal claim yet raised and neither commerce jurisdiction nor a transaction or contract involving commerce.

4. Many of the arguments in our Cross-Exceptions show how the FUAP directly interferes with Section 7 rights by prohibiting or limiting concerted activity. That is also the thrust of the General Counsel's argument as to why any limitation on group activity is unlawful. Our Cross-Exceptions however detail consistent with the General Counsel's theory why such prohibition on group activity is unlawful. For example, as we point out, a limitation on group activity prohibits the assertion of *res judicata* or collateral estoppel (also called claim or issue preclusion). As we point out in our Cross-Exceptions, the FUAP interferes with salting or other representative action. As we point out in our Cross-Exceptions, the FUAP interferes with the right of individuals to bring claims which are not class actions or require other procedural devices found in the courts such as simply having two claimants or plaintiffs. This rebuts Montecito's argument (as echoed by many employers) that the National Labor Relations Act cannot limit federal rules of civil procedure and other statutory provisions which govern federal courts. There are group claims which don't require those procedural devices such as created by the Federal Rules of Civil Procedure which are prohibited by the FUAP. Thus, it interferes with Section 7 rights.

5. The Answering Brief does not address the arguments made in Part VI of the Brief that there are many federal statutes which allow various forms of group action which would not be preempted by the FAA and which are unlawfully restricted by the FUAP. Many of these are whistle-blower type claims which are brought directly to federal agencies or through the courts. The FUAP unlawfully limits the rights of employees to invoke those claims concertedly. See also

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Part XVII (ERISA). If one federal statute express allows group claims, the FAA cannot take that away. See, 29 USC § 1132(a).

6. One form of expressive activity which is protected by the First Amendment and the National Labor Relations Act is boycotting, bannering, picketing, and leafleting and so on. See Part IX of the Brief. The express language of the FUAP would limit the right of employees to use these alternative and effective means of resolving concerted disputes because the FUAP requires that such grievances are disputes within the meaning of the FUAP must be resolved exclusively by the FUAP. The FUAP governs "all disputes" including those that can be resolved by direct economic activity. This is the worst form of yellow-dog contract prohibited by the NLRA and the Norris-LaGuardia Act. Nothing in the FUAP clarifies that employees have the right to engage in such Section 7 activity or such activity protected by the Federal constitution or state constitutions where employees act together. This interferes with the right of association enshrined in the First Amendment

7. Montecito has not addressed the argument in Part VII that there are state law claims which are no affected by or preempted by the FAA.

8. Montecito has not addressed the arguments made in Parts VII, and X through XIII. This should be treated as a concession that the Cross-Exceptions are valid.

9. The FUIAP does not make it clear that the employer would bear <u>all</u> the costs of the arbitration procedure. All that Montecito argues is that is required by California law. (See Answering Brief page 7-8.) Montecito offers no authority for such a proposition and no employee would read the FUAP as an offer by the employer that it will bear all such costs.

10. Additionally, Montecito's argument ignores the core point that employees can share the costs and minimize the costs by acting together. Requiring employees to act individually and separately increases the cost to employees to bring claims. This imposes a penalty on employees.

11. California law, Labor Code § 98 offers a free process by which employees can bring their claims to the Labor Commissioner. They are assisted by the Labor Commissioner and

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the Labor Commissioner is a forum which welcomes such claims. There are substantial advantages of bringing claims before the Labor Commissioner such as burden shifting, the requirement of posting bonds and so on. Employees are deprived of those rights when they are forced to use the FUAP.

12. The Charging Party did object to the stipulated record. Montecito is correct; the ALJ "exercised his discretion to grant the motion to submit a stipulated record…." See Answering Brief page 8. We maintain that that ruling was improper and that there was a record which should have been made.

13. The remedies sought by the Charging Party are fair under the circumstances of this case. We don't think that these remedies should be beyond the normal scope of Board remedies. They should be part of any remedy.

14. For the reasons suggested above, the Cross-Exceptions should be granted. The Board will have to decide whether the FAA applies and if so, to what extent. Even though the Supreme Court may decide in pending cases whether the FAA governs, that will not resolve all the issues in this case. Only if the Supreme Court finds that Section 7 prohibits this kind of FUAP notwithstanding the FAA will the Board be able to duck some but not all of the issues raised in the Cross-Exceptions.

Dated: February 14, 2017

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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On February 14, 2017, I served the following documents in the manner described below:

CHARGING PARTY'S REPLY TO ANSWERING BRIEF TO CHARGING PARTY'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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VIA E-FILING

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 14, 2017, at Alameda, California.

/s/ Karen Kempler
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